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PLAN SPONSOR FIDUCIARY DUTY FOR THE SELECTION OF OPTIONS IN PARTICIPANT-DIRECTED DEFINED CONTRIBUTION PLANS AND THE CHOICE BETWEEN STABLE VALUE AND MONEY MARKET

Paul J. Donahue^{*}

I. INTRODUCTION

During 2002, employees and their employers contributed over \$84 billion to defined contribution pension plans (DC Plans),¹ bringing the amount held in such plans on behalf of many of America's working people to nearly \$2 trillion;² a staggering amount that exceeded by over \$200 million the amount held in defined benefit pension plans (DB Plans).³

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1. A defined contribution pension plan is a pension plan funded by contributions of a specified percentage of an employee's compensation. BARBARA J. COLEMAN, PRIMER ON EMPLOYEE RETIREMENT INCOME SECURITY ACT 32-34 (BNA Books 4th ed. 1993). In many instances, employees are the only persons making contributions to a given DC Plan. *Id.* In other, rarer instances, an employer may be the only contributor to a given DC Plan. *Id.* In perhaps the most typical model found in today's workplace, an employer will agree to match a portion of an employee's contributions to the DC Plan. *Id.* For purposes of the nomenclature used throughout this Article, the employer, group of employers, or union establishing and offering a pension plan to its workers or members is called the "Plan Sponsor"; each employee who participates in such plan is synonymously called a "Plan Participant." *Id.*

2. More precisely, the total amounts held in defined benefit pension plans and DC Plans at the end of the third quarter of 2002 were \$1.56 trillion and \$1.80 trillion, respectively. BUREAU OF ECONOMIC ANALYSIS, EMPLOYER CONTRIBUTIONS FOR EMPLOYEE PENSION AND INSURANCE FUNDS BY INDUSTRY AND BY TYPE, NATIONAL INCOME AND PRODUCT ACCOUNTS TABLE 6.11D (April 2004), available at <http://www.bea.gov/bea/dn/nipaweb/TableView.asp?SelectedTable=208&FirstYear=2003&LastYear=2004&Freq=Year> [hereinafter *NIPA Table*].

3. COLEMAN, *supra* note 1, at 32. A defined benefit pension plan is a pension plan under which the Plan Sponsor promises to pay a specified monthly amount to each Plan Participant (and, often, the Plan Participant's surviving spouse or other beneficiary) for life. *Id.* This monthly

While DC Plans and DB Plans share the goal of providing retirement income to their Plan Participants, the way in which they seek to provide that income differs significantly in one respect. Specifically, when a Plan Participant in a DC Plan retires, the amount of income available to him depends on the cumulative amount contributed to his account, plus the investment return of that account.⁴ The Plan Sponsor has no financial obligation to the Plan Participant beyond making any agreed-upon employer contributions to the employee's account.⁵ In other words, the Plan Sponsor is not directly responsible for the investment return in the Plan Participant's account. By contrast, in a DB Plan, the Plan Sponsor has the risk that the Plan's investments do not perform well. If the amounts that a Plan Sponsor has contributed to the DB Plan, plus the investment return of the Plan, are insufficient to make the Plan Sponsor's agreed-upon payments to retired Plan Participants, then the Plan Sponsor must contribute additional amounts to the Plan.⁶ Importantly, for both DB plans and DC Plans, the Employee Retirement Income Security Act (ERISA) imposes on Plan Sponsors the legal obligation to act in the best interests of the plan participants.⁷

payment is typically determined according to a formula that incorporates the Plan Participant's annual average salary and the number of years he has worked for his employer. *Id.*

4. *Id.* at 33.

5. *Id.*

6. 29 U.S.C. § 1082 (2000). The main purpose underlying the enactment of the Employee Retirement Income Security Act of 1976, 29 U.S.C. §§1001-1461 (2000) ("ERISA"), was to require an employer providing a DB Plan to periodically measure its investment return and to compel an employer to contribute more money to its DB Plan if that investment return was not keeping pace with the employer's benefit promises. After setting out the commerce clause justifications for Congressional action, the stated reasons for action listed in 29 U.S.C. §1001 (Congressional findings and declaration of policy) deal exclusively with funding defects of DB Plans. For instance, despite the enormous growth in such plans, many employees with long years of employment were losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funding to pay promised benefits were endangered; owing to the termination of plans before requisite funds had accumulated, employees and their beneficiaries were deprived of anticipated benefits; and that it was therefore desirable, in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness. *See generally* COLEMAN, *supra* note 1.

7. 29 U.S.C. §1104 (2000). A Plan Sponsor's statutory obligation to act in the best interests of Plan Participants is called the Plan Sponsor's "fiduciary duty." The ERISA conference report states: "The [fiduciary duty] provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries." Joint Explanatory Statement of the Committee of Conference on the Employee Retirement Income Security Act, reprinted in ERISA SELECTED LEGISLATIVE HISTORY 1974-1986 33 (Anthony A. Harris ed., BNA 1988) (1986) [hereinafter BNA].

Although ERISA governs both DB Plans and DC Plans, until relatively recently, the majority of assets held in private pension plans were held in DB Plans.⁸ In addition, because the primary concern underlying the enactment of ERISA was the existence of under-funded DB Plans, it was only natural that DB Plans received more of the Department of Labor's attention when it came to the promulgation of regulations.⁹ As noted above, however, in recent years the economic importance of DC Plans has grown significantly. At present, nearly 54% of total private pension plan assets are held in DC Plans—and this percentage is likely to increase, because while \$80 billion was contributed to DC Plans in 2002, only \$39 billion was contributed to DB Plans.¹⁰

Unfortunately, notwithstanding the explosive growth of DC Plans, the Department of Labor has still not addressed much of its regulatory authority to DC Plans. Recent events, however, are likely to change this antipathy. In particular, the bankruptcies of Enron and WorldCom have stimulated long-overdue and increased scrutiny regarding how well Sponsors of DC Plans are meeting their fiduciary duties.¹¹ These bankruptcies had particularly disastrous effects on employees whose DC Plan assets were heavily invested in the stock of their employers.¹² The very recently announced decision of IBM to freeze its DB Plan and place more reliance on a 401(k) plan is likely to accelerate the move away from DB Plans and elevate the importance of more intensive scrutiny of Plan Sponsor compliance with fiduciary duty in managing DC Plans.¹³

One of the main duties of a DC Plan Sponsor is to choose the

8. As recently as 1985, the assets in DB Plans were double those of DC Plans. EMPLOYEE BENEFIT RESEARCH INSTITUTE, EDUCATION AND RESEARCH FUND, PENSION INVESTMENT REPORT: 3RD QUARTER 2002 10 (Feb. 2003).

9. ERISA gives primary regulatory responsibility to the Department of Labor. Of the early ERISA regulations, all pertaining to a single type of benefit plan apply to DB Plans. *See, e.g.*, 29 C.F.R. §2530.203 (2005) (minimum vesting); 29 C.F.R. §2530.204 (benefit accrual). The focus of other regulations clearly has funding of DC Plans in view, *see* 29 C.F.R. §2550.407 (2005), imposing limits on acquisition of employer securities and real property.

10. *NIPA Table, supra* note 2.

11. *See* Kris Frieswick, *Prudent Man with a Plan*, CFO MAGAZINE, June, 2002, at 75.

12. The losses of these individuals have drawn particular attention to the perils of employer stock as an investment option within a DC Plan. *See Unlearned Lessons in 401(k) Investing*, MSNBC.com, <http://msnbc.msn.com/id/5190102/print/1/displaymode/1098> (last visited Nov. 15, 2005). The length of the bear market after the boom of the nineties has led plan participants to make a more searching review of the options their employers offered them. *See* Kris Frieswick, *Honey, I Shrunk the 401(k)*, CFO MAGAZINE, Aug. 1, 2002, at 55.

13. *See* Mary Williams Walsh, *I.B.M. to Freeze Pension Plans to Trim Costs*, N.Y. TIMES, January 6, 2006, available at <http://www.nytimes.com/2006/01/06/business/06pension.html>.

vehicles in which Plan Participants can invest their money.¹⁴ ERISA allows a Plan Sponsor to reduce the liability it would otherwise have for selection of investment options if it allows its employees to choose among options that meet certain tests.¹⁵ A Plan Sponsor must also give its employees enough information about each of these options to allow its employees to choose intelligently.¹⁶ Because these provisions are set forth in Section 404(c) of ERISA,¹⁷ DC Plans that are designed to shift the responsibility for selection of investment options to Plan Participants are colloquially called “404(c) Plans.”¹⁸ Both Enron¹⁹ and WorldCom²⁰ offered 404(c) Plans.

As might be expected, consultants have made employers well aware that 404(c) Plans can reduce a Plan Sponsor’s liability for the investment decisions of Plan Participants. However, consultants have not necessarily been as successful at educating Plan Sponsors about the liabilities that remain.²¹ Selection of a DC Plan’s investment options remains a fiduciary function, and Plan Sponsors must choose those investment options knowledgeably and thoughtfully.²² Even when the options are chosen with due care, Plan Sponsors must assure a range of choice and make adequate disclosure to participants in order to escape liability for the choices Plan Participants make among those options.²³

II. STRUCTURE OF THE ARTICLE

This Article is divided into two parts. In Part I, this Article summarizes the scope of a Plan Sponsor’s fiduciary duty under ERISA and explains why that fiduciary duty extends to the selection of investment options for Participant-directed DC Plans (*i.e.*, 404(c)

14. 29 C.F.R. § 2550 (1992).

15. 29 U.S.C. § 1104(c) (2000).

16. 29 C.F.R. § 2550.404c-1(b)(2)(B).

17. 29 C.F.R. § 2550.404c-1.

18. *Id.*

19. Frances B. Smith, *Your 401(k) Plan—Lessons from Enron*, CONSUMER RESEARCH MAGAZINE, Feb., 2002, available at <http://www.consumeralert.org/pubs/research/CRFeb02.htm>.

20. See Jane J. Kim and Kaja Whitehouse, *Getting Personal: WorldCom Fall Renews Pension Debate*, DOW JONES NEWS SERVICE, July 10, 2002, at 1.

21. See W. Scott Simon, *Fiduciary Focus: How to Bring Value to 401(k) Sponsors*, MORNINGSTAR.COM, May 6, 2004, http://advisor.morningstar.com/advisor/doc/print_article/1,8911,3620,00.html (last visited Nov. 15, 2005).

22. 29 U.S.C. § 1104(a)(1)(B) (2000). This obligation is usually called the “prudent expert” rule.

23. 29 C.F.R. § 2550.404c-1(b)(3) (1992).

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Plans).²⁴ In this context, the Article will then examine some of the safe harbor provisions applicable to 404(c) Plans, including the requirement that such Plans offer a low-risk-investment alternative and the requirement that such Plans provide adequate disclosure to Plan Participants about each investment alternative.

In Part II, this Article will apply the law explicated in Part I to a particular investment-option selection decision made by all Sponsors of 404(c) Plans; namely: the decision to offer a money market fund versus a stable value fund. In Part II, this Article argues that Plan Sponsors who choose to offer a money market option instead of a stable value option breach their fiduciary duty to Plan Participants.

A. Part I

1. General Definition of ERISA Fiduciary Duty.

Section 404 of ERISA addresses fiduciary duties.²⁵ Specifically, Section 404(a)(1) of ERISA provides, in pertinent part, as follows:

[A] fiduciary shall discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries and—

for the exclusive purpose of:

providing benefits to participants and their beneficiaries; and

defraying reasonable expense of administering the plan;

with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

in accordance with the documents and instruments governing the plan

24. The Article will endorse recent suggestions that increasing knowledge about *actual* Plan Participant investment behavior and psychology must figure in the investment options selected by a Plan Sponsor. In other words, ERISA decisions must be based on actual, not ideal, Plan Participants.

25. 29 U.S.C. § 1104 (2000).

insofar as such documents and instruments are consistent with the provisions of [ERISA].²⁶

Courts have concluded that Congress intended this definition to provide a great deal of protection to Plan Participants.²⁷ In close cases, Plan Participants always win, as evidenced in the following representative opinion:

The sincerity of the trustees' belief was not questioned in the hearing, but it is essentially irrelevant to a determination of the prudence of their conduct. While there is flexibility in the prudence standard, it is not a refuge for fiduciaries who are not equipped to evaluate a complex investment. If fiduciaries commit a pension plan's assets to investments which they do not fully understand, they will nonetheless be judged, as provided in the statute, according to the standards of others "acting in a like capacity and familiar with such matters."²⁸

For fiduciaries, ignorance of the economic characteristics of a particular investment is no excuse, as fiduciaries are measured against the standard of informed choice made by an expert.²⁹

One element of the definition of fiduciary duty that may loom larger in the future is the following phrase contained in Section 404(a)(1)(B): "under the circumstances then prevailing;" an ERISA fiduciary must be an informed fiduciary.³⁰ As new information becomes available that "a prudent man acting in a like capacity and familiar with such matters would use," the ERISA fiduciary ignores such information at his peril.³¹ As the Fifth Circuit Court of Appeals has stated:

An independent appraisal is not a magic wand that fiduciaries may simply wave over a transaction to ensure that their responsibilities are fulfilled. It is a tool and, like all tools, is useful only if used properly [Fiduciaries] are entitled to rely on the expertise of others However, as the source of information upon which the experts' opinions are based, the fiduciaries are responsible for ensuring

26. 29 U.S.C. § 1104(a)(1)(A)-(D).

27. The conferees intended this outcome. The Conference Report accompanying ERISA states: "The conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." BNA, *supra* note 8, at 39.

28. *Marshall v. Glass/Metal Ass'n & Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378, 384 (D. Haw. 1980).

29. *Id.*

30. 29 U.S.C. § 1104(a)(1)(B).

31. *Id.*

that that information is up-to-date.³²

It would seem to go without saying that a prudent person acting with skill and diligence and familiar with investments should be aware of the statutory and regulatory requirements governing investment vehicles which the ERISA fiduciary is considering. As we shall discuss below, stable value depends on the ability to account for investment options at contract value, a marked variation from the usual standard of fair value. A paramount duty of ERISA fiduciaries dealing with Stable Value, above all fiduciaries with the duty to value participant accounts for purposes of transactions, is to assure themselves that participant transactions qualify for contract valuation.

We shall discuss below how recent accounting and regulatory developments heighten the significance of the “under the circumstances then prevailing” standard.³³

2. Selection of Investment Options as an Element of Fiduciary Duty.

In the preamble to the Final Regulations governing Section 404(c) of ERISA:

The Department [of Labor] emphasizes, however, that the act of designating investment alternatives (including look-through investment vehicles and investment managers) in an ERISA 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable. All of the fiduciary provisions of ERISA remain applicable, to both the initial designation of investment alternatives and investment managers and the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan. Therefore the particular plan fiduciaries responsible for performing these functions must do so in accordance with ERISA.³⁴

32. *Donovan v. Cunningham*, 716 F.2d 1455, 1474 (5th Cir. 1983).

33. 29 U.S.C. § 1104(a)(1)(B) (2000).

34. 29 C.F.R. § 2550 (1992). In her article, Susan Stabile does not quote this completely unambiguous section of the preamble. Susan Stabile, *Freedom to Choose Unwisely: Congress' Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*, 11 CORNELL J. L. & PUB. POL'Y 361, 377 (2002). She quotes instead a restatement in a footnote. *Id.* at 377 n.78 (quoting 57 Fed. Reg. 46,906, 46,924 n.27 (October 13, 1992)). Professor Stabile then interprets the logic of *In re Unisys Savings Plan Litigation*, 74 F.3d 420 (3d Cir. 1996), despite applying to transactions that predated the Final Regulations, as stripping this section of the regulations of any practical effect, by suggesting that it precludes an award of damages due to the breach. Even if her interpretation of *In re Unisys* were plausible, it seems unreasonable to suggest that subsequent

The Department of Labor strongly reaffirms this position in its amicus brief in the Enron litigation.

The scope of ERISA 404(c) relief is limited to losses or breaches “which resulted from” the participant’s exercises of control. Section 404(c) plan fiduciaries are still obligated by ERISA’s fiduciary responsibility provisions to prudently select the investment options under the Plan and to monitor their ongoing performance. See Advisory Opinion No. 98-04(A) (‘In connection with the publication of the final rule regarding participant directed individual account plans, the Department emphasized that the act of designating investment alternatives in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable.’); Letter from the Pension and Welfare Benefits Administration, U.S. Department of Labor to Douglas O. Kant, 1997 WL 1824017 at *2 (Nov. 26, 1997) (‘The responsible plan fiduciaries are also subject to ERISA’s general fiduciary standards in initially choosing or continuing to designate investment alternatives offer by a

publication of the regulation would not have altered the judicial context. This seems wrong. The statement quoted states emphatically that selection of the universe of choices is not the result of participant control, and therefore implies that a fiduciary cannot escape responsibility for provable damages when a Plan Participant chooses an option that should not have been available to begin with.

Professor Stabile’s reading of *In re Unisys* is seriously flawed. The *Unisys* Opinion frames the issues thusly:

The plaintiffs, participants in individual account pension plans that Unisys Corporation maintained for its employees, alleged, *inter alia*, that the defendants breached ERISA’s fiduciary duties of prudence and diversification by investing plan assets in Executive Life guaranteed investment contracts, as well as ERISA’s fiduciary duty of disclosure by providing participants with misleading or incomplete communications regarding these investments and Executive Life’s financial condition. In their defense, the defendants raised a question of first impression, asserting that section 1104(c) of the Act, which relieves fiduciaries of liability for losses which result from a plan participant’s exercise of control over individual account assets, applies.

Id. at 425.

The Opinion later frames the issue of the extent to which damages might flow from control:

In our view, if the Plans did not offer an acceptable alternative to GIC investments, a participant did not have the freedom and, in turn, the control to decide how his or her assets were ultimately invested. In this regard, we find the evidence lacking. The record includes documents which give a general description of the six funds the Plans offered; it does not, however, include evidence sufficient to measure the breadth of actual plan investments or assess all of the investment alternatives available to participants.

Id. at 446-47.

The *Unisys* decision actually supports the assertion that damages from the Plan Sponsor can be obtained as a result of option selection decisions, rather than the reverse. *Id.* There is no tension between the decision and the natural force of the preamble to the regulation. Perhaps Professor Stabile’s desire to make a case for legislative reform has led her unconsciously to minimize the protection provided by the existing legislative and regulatory regime. Stabile, *supra*, at 361.

404(c) plan.’).³⁵

A Plan Sponsor who has not exercised due diligence with respect to the selection of investment options in its DC Plan has unambiguously breached its fiduciary duty.³⁶ No expert makes decisions without considering various alternatives and comparing relative benefits.³⁷ When due diligence is not exercised, then only the question of damages remains to be settled. A Plan Sponsor would reduce litigation expenses simply by stipulating the fact of breach in such a case.

It would be very difficult to prove that a Plan Sponsor’s review of DC Plan investment alternatives met ERISA standards without written documentation that included extensive quantitative analysis. Vague, unquantified concerns, such as “I thought the X fund was safer,” would have no probative value. An expert would identify all aspects of return and risk and provide the greatest expected return for a given level of risk.

In many cases, the contrast between a Plan Sponsor’s approach to choosing managers for its DB Plan and the same Plan Sponsor’s approach to choosing options for its DC Plan would likely be sufficient to establish a breach of fiduciary duty.

3. The Fiduciary Duty Safe Harbor of Section 404(c) of ERISA.

Section 404(c)(1)(B) of ERISA provides as follows:

In the case of a pension plan which provides for individual accounts and that permits a participant or beneficiary to exercise control over the assets in his account [i.e., a DC Plan], if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) – (B) no person who is otherwise a fiduciary shall be liable . . . for any loss, or by reason of any breach, which results from such participant’s or beneficiary’s exercise of control.³⁸

This statute establishes a “safe harbor,” which immunizes eligible plan fiduciaries from liability for breaches of their fiduciary duty.³⁹ While the statute itself is rather straightforward, the regulations set forth

35. Brief for U.S. Dep’t of Labor et al. as Amici Curiae Supporting Petitioners, *Tittle v. Enron Corp.* (S.D. Tex. Sept. 3, 2002) (No. 01-3913).

36. *See supra* notes 30-33.

37. *See supra* notes 28-30.

38. 29 U.S.C. § 1104(c)(1)(B) (2000).

39. *Id.*

several additional requirements that must be satisfied in order for a plan fiduciary to avoid liability for losses in a Plan Participant's account.⁴⁰ One of the requirements has the effect of obliging a DC Plan to offer an "income-producing, low-risk, liquid fund"; another of the requirements relates to adequate disclosure of investment options. Each of the requirements is discussed immediately below.

4. The Requirement of an Income-Producing, Low-Risk, Liquid Fund.

A 404(c) Plan must provide "a participant or beneficiary an opportunity to choose, from a broad range of investment alternatives, the manner in which some or all of the assets in his account are invested."⁴¹ Department of Labor Regulations Section 404(c)-1(b)(3) stipulates the minimum requirements for the range of investment alternatives; specifically: (1) there must be at least three alternatives;⁴² and (2) the alternatives must "in the aggregate enable the participant or beneficiary, by choosing among them, to achieve a portfolio with the aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary."⁴³

A 404(c) Plan must also provide "an opportunity for a participant or beneficiary to exercise control over the assets in his individual account."⁴⁴ Reasonable restrictions on transactions are not inconsistent with participant control;⁴⁵ however, at least three of the investment alternatives must permit transactions at least once in a three-month period.⁴⁶ At least one of these three investment alternatives must accept transfers as frequently as instructions can be given for any other option,⁴⁷ or each investment alternative which permits participants to give instructions more than once in a three-month period must allow transfers to "an income producing, low risk, liquid fund."⁴⁸ Plan

40. 29 C.F.R. § 2550.404c-1 (1992).

41. 29 C.F.R. § 2550.404c-1(b)(1)(ii).

42. 29 C.F.R. § 2550.404c-1(b)(3)(i)(B).

43. 29 C.F.R. § 2550.404(c)-1(b)(3)(i)(B)(3). The requirement of an income-producing, low-risk, liquid fund is probably imposed by this regulation alone. For a Plan Participant nearing retirement – and even more so for a Plan Participant in retirement – an income-producing, low-risk, liquid investment alternative is normally appropriate.

44. 29 C.F.R. § 2550.404c-1(b)(1)(i).

45. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C).

46. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C)(1).

47. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C)(2)(i).

48. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C)(2)(ii).

Sponsors have universally responded to these requirements by including a “principal-protection” alternative among their DC Plan investment alternatives.⁴⁹ In order to meet this requirement, Plan Sponsors have invariably chosen to offer either a Stable Value Fund, or a Money Market Fund or both.⁵⁰

5. The Disclosure Requirement of Section 404(c) of ERISA.

The regulations underlying Section 404(c) of ERISA require that “[t]he participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan.”⁵¹ More specifically, the regulations require:

A description of the investment alternatives available under the plan and, with respect to each designated investment alternative, a general description of the investment objectives and risk and return characteristics of each such alternative, including information relating to the type and diversification of assets comprising the portfolio of the designated investment alternative.⁵²

B. Part II

1. Introduction to Stable Value Funds and Wrap Contracts.

49. Although the statute and regulations do not strictly mandate a principal-protection investment alternative, a Plan Sponsor would clearly have to include an option at least as conservative as a high-quality, short-duration bond fund in order to have its DC Plan design fall within the 404(c) Plan safe harbor. In practice, however, all Plan Sponsors of 404(c) Plans offer a principal-protection investment alternative.

50. According to the 46th Annual Survey of Profit Sharing and 401(k) Plans (Profit Sharing and 401(k) Council of America), for the plan year 2002, 52.1% of plans had Stable Value options, 54.6% had Money Market options, and 6.7% both. Every single plan had one or the other. In a telephone conversation on June 25, 2004, David Wrap, President of the Profit Sharing and 401(k) Plans Council, told the author that among larger plans, 70% had Stable Value; by overall assets, 16.9% of Plan Participant assets were invested in Stable Value and 4.7% were invested in Money Market Funds. Telephone Interview with David Wrap, President, Profit Sharing and 401(k) Plans Council, in New York City, NY (June 25, 2004).

51. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B).

52. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ii). With respect to an investment in a Plan Sponsor’s stock, 29 C.F.R. §§ 2550.404c-1(b)(2)(i)(B)(1)(vii) and (viii): try to ensure that employers cannot monitor the choice employees make with respect to employer stock and thereby achieve a level of investment in employer stock by indirect pressures for which that they are unwilling to take fiduciary responsibility; and require that employees receive a copy of the Plan Sponsor’s most recent prospectus.

In order to judge whether the Sponsor of a 404(c) Plan has acted as a prudent expert in making the decision to offer (or not offer) Plan Participants the ability to invest in a Money Market Fund, a Stable Value Fund, or both, the reader must know something about the technical aspects of a Stable Value Fund.⁵³

Stable Value Funds are one of the more popular investment options among DC Plan Participants.⁵⁴ The cornerstone of a Stable Value Fund is that it accounts for its investments at “contract value,” i.e., at cost, plus accrued interest.⁵⁵ In order to be eligible to be reported at contract value, an investment must provide a *guarantee* that principal and accrued interest will be available to meet Plan Participants’ demands for benefits and transfers, each as permitted under their Plans. This guarantee is provided by a “wrap contract” sold by large financial intermediaries, such as banks or insurance companies.⁵⁶

53. This introduction is intended to be as general and brief as possible while still giving a reader who is new to Stable Value Funds all of the information that is necessary in order to make an informed decision about the fiduciary conduct of Plan Sponsors in choosing among low-risk investment options. For more information, see Paul J. Donahue, *The Stable Value Wrap: Insurance Contract or Derivative? Experience Rated or Not?*, 37 RISKS AND REWARDS (Investment Section of the Society of Actuaries, Schaumburg, IL), July 2001, at 18 [hereinafter Donahue, *Stable Value Wrap*].

54. According to the Stable Value Investment Association, in 1998 Stable Value Funds held 16% of DC Plan assets (\$182 billion). Donahue, *Stable Value Wrap*, *supra* note 54, at 25 n.2.

55. In other words, as with Money Market Funds, if a Plan Participant invests \$1 in a Stable Value Fund he will, barring economic Armageddon, receive back \$1 plus accrued interest. (The “stable” in Stable Value Fund refers to this preservation of principal; account balances do not vary with changes in market interest rates, but only increase with credited interest. The rate at which interest is credited will change frequently, perhaps as often as daily, but such changes will be very small in magnitude.). See Paul J. Donahue, *What AICPA SOP 94-4 Hath Wrought: The Demand Characteristics, Accounting Foundation and Management of Stable Value Funds*, 16:1 BENEFITS QUARTERLY, First Quarter 2000, at 44, 46 [hereinafter Donahue, *What AICPA SOP 94-4 Hath Wrought*].

56. AICPA Statement of Position 94-4, the Stable Value “constitution,” descriptively names this guarantee “a principal and accrued interest risk transfer.” Industry practice describes this guarantee as “benefit responsiveness,” which is provided by the “benefit-responsive wrap contract,” or simply the “wrap.” (In the discussion that follows, we shall refer to the principal and accrued interest risk transferred by these contracts as a “wrap”). Statement of Position 94-4, *Reporting of Investment Contracts Held by Health and Welfare Benefit Plans and Defined Contribution Pension Plans* (American Institute of Certified Public Accountants, New York, NY, September 23, 1994) at 15. The staff of Financial Accounting Standards Board (FASB), arguably the most important non-governmental financial regulator in the world, has finalized two Staff Positions, AAG Inv-1 and SOP 94-4-1. See *Reporting of Fully Benefit-Responsive Investment Contracts Held by Certain Investment Companies Subject to the AICPA Investment Company Guide*, posted December 29, 2005, http://www.fasb.org/fasb_staff_positions/fsp_aag_inv-1&sop_94-4-1.pdf (last visited Jan. 18, 2006) [hereinafter AAG Inv-1]. This position, despite the limited scope of the title, amends SOP 94-4, and thereby affects all Stable Value. The Financial Accounting Standards Board has modified SOP 94-4 in ways that are generally favorable for Stable Value plan participants.

It is effective December 15, 2006, for all plan years ending on or after that date. We will

In essence, a wrap assures that funds will always be available to pay Plan benefits and make transfers at contract value—regardless of the market value of the underlying assets in which Plan Participants' accounts are invested.⁵⁷ Sellers of wraps take the risk (for which they are compensated) that Plan Participants will withdraw large amounts from Stable Value Funds when the market value of the underlying assets in the Stable Value Fund is less than their book value.⁵⁸ In extreme cases, such a withdrawal would force the wrap issuers to pay the Stable Value Fund money to make up the difference.⁵⁹ This is most likely to happen when short-term interest rates, i.e., those offered on investments held in Money Market Funds, are *higher* than mid-term interest rates, i.e., those offered on investments held in Stable Value Funds.⁶⁰ This risk is usually called “the risk of disintermediation.”⁶¹ Some inversion of the yield curve occurred at the end of 2005 for the first time in five years.⁶²

During a period of disintermediation, wrap sellers could face significant losses on wraps, if Plan Participants could readily transfer assets from a Stable Value Fund to a higher-yielding Money Market Fund.⁶³ It is critical to recognize that modern Stable Value Fund investors almost never have available the option to transfer funds directly to a Money Market Fund. In order for a wrap to be a financially sound product, wrap sellers nearly universally insist that the 404(c) Plan not allow direct transfers from a Stable Value Fund into a Money Market Fund.⁶⁴ In the typical 404(c) Plan that contains both a Stable Value Fund and a Money Market Fund, the Plan Participant must “wash” money

discuss the effect of the amendment of SOP 94-4 below. *See also* Donahue, *Stable Value Wrap*, *supra* note 54; Donahue, *What AICPA SOP 94-4 Hath Wrought*, *supra* note 55, at 49.

57. Donahue, *Stable Value Wrap*, *supra* note 54, at 18.

58. Paul J. Donahue, *Measuring Fair Value for Participation Units in Stable Value Pooled Funds*, 41 RISKS AND REWARDS (Investment Section of the Society of Actuaries, Schaumburg, IL), Feb. 2003, at 29 [hereinafter Donahue, *Stable Value Pooled Funds*].

59. Donahue, *Stable Value Wrap*, *supra* note 54, at 22.

60. *Id.* at 23.

61. Donahue, *Stable Value Pooled Funds*, *supra* note 58, at 29.

62. *See* CNNMoney.com, Markets and Stocks, <http://money.cnn.com/2005/12/28/markets/stockswatch/?cnn=yes> (last visited Jan. 18, 2006). The last significant period of disintermediation occurred at the end of the 1970s and early 1980s, when the yield curve became severely inverted during a period of overall increases in interest rates. Donahue, *Stable Value Wrap*, *supra* note 54, at 23. The author is one of those who believes that globalization of finance has worked a shift in paradigm that makes extreme interest rate volatility of a major global markets participant, like the United States, much less probable, if not actually impossible. Minor inversions of the type that has just occurred do not pose that threat.

63. Donahue, *Stable Value Wrap*, *supra* note 54, at 23.

64. *Id.*

withdrawn from his Stable Value Fund account in an equity investment alternative for at least ninety days.⁶⁵

Naturally, an investment fund must actually qualify to use the wrap to value assets at contract value for the financial guarantee of the wrap contract to be of any benefit. For an employer separate account Stable Value Fund, compliance with the requirements of SOP 94-4 now provides that right.⁶⁶ Pooled Stable Value Funds are generally organized as bank collective trusts.⁶⁷ Bank collective investment trusts are governed by regulations issued by the Office of the Controller of the Currency (OCC) found at 12 C.F.R. § 9.18.⁶⁸ The basic requirement for valuation of collective investment funds is that they be valued at market value.⁶⁹ However, in a letter dated December 21, 1995, the OCC permitted “CIFs consisting solely of defined contribution plan assets invested only in fully benefit-responsive GICs/SICs and liquid, short-term securities and money instruments to [value] GICs/SICs at contract value.”⁷⁰

The last sentence of the letter reiterates that the exemption applies solely to funds consisting entirely of DC Plan assets: “The OCC will continue to require CIFs consisting of any defined benefit assets and all CIFS holding GICs/SICs that are not benefit-responsive to value those contracts at fair value.”⁷¹

Since 1995, for a Stable Value pooled fund to accept defined benefit assets and to account for the fund at contract value, has been, at best, serious negligence. Recent discussions at the Securities Exchange Commission (SEC) and at the Financial Accounting Standards Board

65. *Id.* This means that funds withdrawn from a Stable Value Fund have to remain in an equity fund, subjecting them to the risk of market loss, before those funds can be reinvested in a Money Market Fund. The atypical situation where direct transfers *are* permitted without an equity wash will be the focus of our discussion of a Plan Sponsor’s fiduciary duty relating to its decision whether to offer Plan Participants a Stable Value Fund, a Money Market Fund, or both. *Id.*

66. See *supra* note 56. In my view, the draft proposal would have raised questions about the continued availability of contract value accounting for individual Plan Sponsor Stable Value options, but the change of a single article, from “a relevant measurement attribute,” to “the relevant measurement attribute” addressed that concern.

67. LMStrategies.com, Stable Value Market Glossary, <http://www.lmstrategies.com/glossary.html> (last visited Jan. 18, 2006) (stating the definition of GIC (stable value) pool).

68. 12 C.F.R. § 9.18 (2004).

69. 12 C.F.R. § 9.18 (b)(4)(ii).

70. Letter from Susan F. Krause, Senior Deputy Comptroller for Bank Supervision Policy, to Charles M. Horn (December 21, 1995) (on file with author). GICs and SICs are types of investment contracts qualifying for Stable Value accounting under the rules of SOP 94-4.

71. *Id.*

(FASB) on wrap valuation⁷² makes the inappropriateness of accounting for a pooled fund with DB assets at contract value very clear. In the future, willful defiance of the OCC regulations will be the only plausible explanation for a pooled fund with defined benefit assets to account for the fund at contract value.

One of the actions taken by FASB that will have the effect of increasing fees for Stable Value pooled funds, while quite possibly decreasing overall retirement security,⁷³ is to allow pooled funds to contain Defined Benefit assets in contravention of OCC regulations and still to allow accounting at contract value. This is especially regrettable given that FASB must be aware of the OCC regulations.⁷⁴ FASB's action has the appearance of willingly condoning a violation of regulatory accounting requirements.

The likelihood that FASB's actions will induce many bank sponsors to value their Stable Value pooled funds in violation of requirements makes it vital that a Plan Sponsor obtain assurance from a Stable Value pooled fund bank sponsor that the pooled fund has no DB Plan investors.

2. Stable Value Funds v. Money Market Funds as Low-Risk Investments.

For investments with guaranteed protection of principal, an investor must normally sacrifice yield in order to gain liquidity, or sacrifice liquidity in order to increase yield.⁷⁵ Obviously, an investor ought not give up more yield than the required liquidity demands—but *that is precisely what Plan Sponsors who choose Money Market Funds instead*

72. See *infra* Part II.B.

73. As we have discussed, a wrap provides a smoothing of transaction values in exchange for a wrap premium. Given their generally long-term investment horizon, DB plans should not agree to pay that premium, all other things equal. (Of course, in a particular circumstance, a lower management fee might entirely offset the cost of the wrap, and make the investment prudent.). Paying a premium for unneeded coverage reduces the funds available to pay the defined benefit.

74. The author personally raised this point in his comments on the FASB draft, available at <http://www.fasb.org/oc/fSPAAGINVA/34863.pdf>, and in an e-mail dated 12/10/2005 to FASB staff and board members.

75. "Liquidity" is used in the sense intended in 29 C.F.R. § 2550.404(c)-1(b)(2)(ii)(C)(2)(ii): immediate access to funds. For a principal-protected investment, this means the right to sell the Plan Participant's units of participation to the fund at a price equal to the Plan Participant's contributions, plus accumulated interest. In the increasingly typical DC Plan that permits daily transactions, this means that the Plan Participant has the right to redeem his units on any day without prior notice. In the language of financial options, the participant owns a "put," a right to sell for a price equal to his contributions plus accumulated interest—regardless of the value of the assets owned by the fund.

of Stable Value Funds have done.

All prudent financial enterprises must match their assets to their liabilities. A principal-protected option in a 404(c) Plan is no different. Money Market Funds can offer a stable net asset value because they invest in very short financial instruments governed by very strict SEC requirements.⁷⁶ Stable Value Funds, on the other hand, can invest in longer-term financial instruments and still offer a stable net asset value because of their wraps. Given the normal term structure of interest rates, longer-term financial instruments have a higher yield than shorter-term financial instruments. As the following statistics make clear, Stable Value Funds simply outperform Money Market Funds.⁷⁷

76. SEC Investment Company Act of 1940, 17 C.F.R. § 270.2a-7 (2001).

77. The author knows of no quantitative analysis that attempts to show that Money Market Funds are superior to Stable Value Funds for risk/return preference. I am grateful to Hueler Analytics, and particularly to Kathleen Schillo and Kelly Hueler, for giving me access and granting me permission to use Hueler Analytics' copyrighted Stable Value Index data in the construction of these charts. The money market data is from the Donahue Money Market All Taxable Funds Index. I am grateful to my former INVESCO colleague Ruth Bottorff for her help in accessing the money market data, and to my former INVESCO colleague Andy Apostol for his help in turning the data into graphs that present so much valuable information.

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PLAN SPONSOR FIDUCIARY DUTY

25

a. How Stable Value Achieves So Favorable a Result

In the retail, non-Pension Plan market, investors have no economic penalty for withdrawing their assets from a Money Market Fund on any day they choose. However, investors who invest in Money Market Funds through their DC Plans are operating in a *different* environment. Federal income tax laws are designed to impose significant impediments to DC Plan Participants who, without these constraints, might apply savings intended for retirement to current consumption. Thus, in order for DC Plans to qualify for the tax-deferral provided under the Internal Revenue Code, a DC Plan must impose significant restrictions on employee withdrawals.⁷⁸ Accordingly, employed Plan Participants generally cannot withdraw money from the Plan, and terminated employees who are not retired pay a stiff penalty if they withdraw Plan assets before retirement age.

By the very design of the laws under which it operates, i.e., the barriers to withdrawal imposed by the Plan and Federal income tax law, a DC Plan is ideally tailored to take advantage of the higher yields offered by a Stable Value Fund. A Plan Sponsor who has only a Money Market Fund within its 404(c) Plan instead of a Stable Value Fund clearly has not taken these special legal circumstances into account. Stable Value Funds can prudently invest at much longer durations than Rule 2A7 permits for Money Market Funds, and thereby can make a much larger contribution to a Plan Participant's retirement security than is possible with a Money Market Fund.

3. The Effect of AAG Inv-1.

As noted above,⁷⁹ FASB has amended SOP 94-4 and made additional requirements for pooled funds. However, in a statement that has the practical effect of leaving unchanged the foundational accounting reality that contract valuation is available for Stable Value investment contracts the amendment notes that "contract value is the relevant measurement attribute for that portion of the net assets available

78. A DC Plan will not be a tax-favored "qualified plan" unless, among many other requirements, benefits begin no earlier than the latest of: (1) normal retirement age under the plan or age 65, whichever is earlier (26 U.S.C. § 401(a)(14)(A)) (2005); (2) a participant's tenth anniversary of participation (26 U.S.C. § 401(a)(14)(B)); or (3) termination of employment (26 U.S.C. § 401(a)(14)(C)). Employees who access plan assets after termination but before reaching age 59 1/2 must, in most circumstances, pay a 10% excise tax in addition to their regular rate of income tax. 26 U.S.C. § 72(t)(1) (2005).

79. See *supra* note 56.

for benefits of a defined-contribution plan attributable to fully benefit-responsive contracts.”⁸⁰

With the exception of the required disclosures, the proposed changes are extremely favorable to Stable Value investors. Of paramount importance, the requirement that pooled funds disclose the termination provisions of their wraps will make the extent of true protection much more evident.⁸¹

The required disclosures about benefit-responsive contracts proposed by the draft will make selection against the Stable Value option easier.⁸² We discuss the peril of this situation in a particular context below.⁸³

4. Offering Both a Stable Value and Money Market Fund.

When a Plan Sponsor offers both a Stable Value Fund and a Money Market Fund, any loss a Plan Participant suffers as a result of choosing the Money Market Fund over the Stable Value Fund seems at first glance to be clearly the direct result of Participant direction. Even though offering the Money Market Fund at all is likely a breach of Plan Sponsor fiduciary duty, because the participant can choose Stable Value, the Plan Sponsor is unlikely to be liable for losses the Participants incur. This is different from the situation where a Stable Value Fund is not offered at all.

However, while the Plan Sponsor may not be liable for losses suffered by those investing in the Money Market Fund, there may now be some Sponsor liability to participants in the Stable Value Fund!⁸⁴ It is the foundation of this article that option selection is a Plan Sponsor fiduciary duty for which section 404(c) provides no relief against damages.

80. *Id.*

81. *See* AAG Inv-1, *supra* note 56.

82. The plan’s statement of net assets available for benefits must list total assets, net assets at fair value, and net assets available for benefits. AAG Inv-1, *supra* note 56, at 14. If the net assets available for benefits are less than the fair value, an informed participant knows that, *pari passu*, there is an immediate gain on withdrawal or transfer. This raises the risk of disintermediation overall, and makes practically certain that some informed participants will benefit at the expense of less-informed participants.

83. *See infra* notes 86-95 and accompanying text.

84. *See infra* note 106 and accompanying text.

5. Poor Plan Design Can Limit Return in a Stable Value Fund.

We noted above that disintermediation is the principal risk faced by wrap sellers.⁸⁵ DC Plan design is the first line of defense against disintermediation,⁸⁶ and responsible DC Plan design is part of a Plan Sponsor's fiduciary duty.⁸⁷ The most obvious DC Plan design that avoids this risk is one that offers only a Stable Value Fund and no other low-risk option.⁸⁸

If a Plan Sponsor chooses to offer a second low-risk option, the responsible Plan Sponsor must prohibit direct transfers from one low-risk option to another, to protect unsophisticated investors in each option against the risk of disintermediation.⁸⁹ In the language of the Stable Value Fund industry, low-risk options other than Stable Value are called "competing funds."⁹⁰ Sound Plan design requires that if a Participant transfers money from a low-risk option, the money must go to an equity fund or a long-duration bond fund (the "equity wash").⁹¹ This requirement forces Participants to expose withdrawals from a low-risk option fund to market risk and serves as a disincentive to such withdrawals that are based purely on disintermediation.⁹²

Where both a Money Market Fund and a Stable Value Fund are available within a given 404(c) Plan, the equity wash protects against disintermediation and allows the Stable Value Fund to achieve its full return potential.⁹³ Since wrap issuers will insist on some form of risk protection, the absence of an equity wash translates into a lower return for Stable Value Fund Participants.⁹⁴

85. See Paul J. Donahue & Stephen F. LeLaurin, *Stable Value, Money Market or Both? Implications for Plan Sponsors and for the Stable Value Industry*, with, 6:4 STABLE TIMES (Stable Value Investment Association, Washington, D.C.), Fourth Quarter 2002, at 15 [hereinafter Donahue, *Stable Value or Money Market*].

86. *Id.* at 10.

87. *Id.* at 11.

88. *Id.* at 10. In such case, Plan Participants would not be able to move their assets from the Stable Value Fund to the higher-yielding Money Market Fund.

89. *Id.*

90. Mark Foley, *Competing Funds: "Barbarians at the Gate" or "The Phantom Menace,"* 8:1 STABLE TIMES (Stable Value Investment Association, Washington, D.C.), First Quarter 2004. Stable Value Fund wrap contracts negotiated by the author typically defined fixed income funds with a duration of less than three years as "competing funds."

91. Donahue, *Stable Value or Money Market*, *supra* note 86, at 10.

92. *Id.* Principal protection is a key value to any investor who chooses Stable Value or Money Market. The requirement that a participant put principal at risk to shift from a Stable Value Fund to a Money Market Fund to capture a short-term gain is therefore a significant disincentive.

93. *Id.*

94. *Id.*

6. Eliminating an Equity Wash: A Violation of Fiduciary Duty.

Where a 404(c) Plan has both a Stable Value Fund and a Money Market Fund and the requirement of an equity wash, there is no doubt that some Plan Participants regard the equity wash as an irritant.⁹⁵ Those Plan Participants are more likely to be financially sophisticated and able to exert more pressure on Plan design.⁹⁶ In effect, they are seeking the right to disadvantage the less financially sophisticated Plan Participants, as we shall illustrate below.⁹⁷ Nothing could be a clearer violation of Plan Sponsor fiduciary duty than for the Sponsor to give in to this pressure.

Plan Sponsors who insist on a Plan design that has both a Stable Value and a Money Market Fund—and that permits direct transfers without an equity wash—have abandoned the best defense against the disintermediation risk absorbed by wrap issuers.⁹⁸ This abandonment has significant consequences. Wrap issuers are not in the business of transferring wealth from themselves to well-advised Plan Participants in adverse investment environments. When Plan design does not provide the protection that wrap issuers need, the investment strategy of the underlying Stable Value Fund portfolio or the terms of the wrap contract (or both) must provide the protection that the wrap issuers have lost.⁹⁹

All wrap contracts have requirements for how the Stable Value Fund is to be invested.¹⁰⁰ This requirement is rational because what wrap sellers are insuring is the difference between book and market values within the Stable Value Fund, which the Fund's investment strategies can sharply influence. "Risky" plans might necessitate a shorter duration fund (to minimize book to market differences). In the extreme, the Plan that allows direct transfers to a Money Market Fund might need to require that the Stable Value Fund have a duration close to that of the Money Market Fund.¹⁰¹ This would minimize the issuer's risk, but it would also erode any return advantage to participants. Forcing shorter

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. The author personally negotiated hundreds of wrap contracts for the nation's leading Stable Value manager, and read hundreds of others negotiated by other managers.

101. Donahue, *Stable Value or Money Market*, *supra* note 85, at 10.

durations could easily reduce the Stable Value Fund's yield advantage by 50%.¹⁰²

Wrap issuers insist on more flexible termination provisions in their wrap contracts where direct transfers are permitted. Understandably, they want to be able to get out of the contract on reasonably short notice when the potential for losses becomes high. The author has argued elsewhere that the termination provision of a wrap contract is its most important feature: "A contract the issuer can terminate at will after only a short time is practically worthless to the plan that owns it."¹⁰³ A wrap contract that can terminate just when Money Market Fund yields exceed Stable Value Fund yields will lead to the total disappearance of principal protection in the Stable Value Fund, turning the option into a short-term bond fund with market losses.¹⁰⁴ This would come as a rude surprise to Plan Participants and could subject Plan Sponsors to an unforeseen liability to make Plan Participants whole.¹⁰⁵

Finally, in the presence of direct transfers to Money Market Funds, even though wrap sellers might have significant investment restrictions and the right to walk away, they also charge more for this abbreviated coverage.¹⁰⁶ Even after the increased protection of more restrictive investment guidelines and more expansive exit provisions, the residual risk is still greater and requires an increased risk charge. This further reduces the yield advantage of the Stable Value Fund option by another 10%.¹⁰⁷

In total, Plan Sponsors may sacrifice half or more of the total yield advantage of Stable Value Funds over Money Market Funds when they choose to permit direct transfers between such funds.¹⁰⁸ The only potential beneficiaries of this loss of yield are financially sophisticated, market-timing Plan Participants who seek to benefit at the expense of their less sophisticated co-Participants.¹⁰⁹ In normal yield environments, all Participants will suffer. Over the periods of time appropriate to consider for a program of retirement savings, the differences in wealth accumulation are meaningful, 36% or more over 15 years, based on the results set out in the Accumulation graph in Section B(2) *supra*.

102. *Id.*

103. Donahue, *What AICPA SOP 94-4 Hath Wrought*, *supra* note 55, at 50.

104. *Id.*

105. The author bases this assertion on his judgment that sponsor disclosure about the Stable Value option is not adequate to alert participants to this possibility.

106. The author was involved personally in price negotiations on such contracts.

107. Donahue, *Stable Value or Money Market*, *supra* note 86, at 10.

108. *Id.*

109. *Id.*

In fact, a Plan Sponsor's fiduciary problem is most severe precisely when the right to transfer is advantageous. A Plan design option that victimizes all Participants when it is not advantageous to transfer assets benefits only those who move quickly when it is advantageous.¹¹⁰ And it benefits those who move only at the expense of those who remain behind.¹¹¹ In essence, the Plan Sponsor has purchased—for a premium assessed against all Participants—the right for a few to benefit at the expense of the many.¹¹² Though no doubt made unknowingly, this Plan Sponsor decision is clearly not in the best interests of Plan Participants. Courts should hold Plan Sponsors liable for losses suffered by unsophisticated Plan Participants both as a result of the defective design of the Plan and of “anti-selection” by the financially sophisticated few, who are far more likely to be highly-compensated employees. Based on the results set out in the graphs above, Plan Sponsor liability for a design that sacrificed 25% of the yield advantage of the Stable Value Fund in order to include a Money Market Fund, which would only be a snare for the unwary and an opportunity for those trying to take advantage of them, is likely to range from 5% to 10% of the value of the Stable Value Fund.

7. Disclosure Required for Stable Value Funds Where Direct Transfers to Money Market Funds are Allowed.

It is the author's view that adequate disclosure to Plan Participants in 404(c) Plans that allow direct transfers between both Money Market and Stable Value Funds *must* alert the Participants to the possibility of profiting by moving from one fund to the other. This disclosure should describe in general terms when it is likely to be in a Participant's interest to move from one fund to the other.

The basic untenability of offering both a Stable Value and Money Market Fund without an equity wash emerges at this point. No wrap issuer would sell a wrap to a Plan which provided the foregoing disclosure—which we have just argued is necessary—because this disclosure would intensify the risk of loss to the wrap issuer in an adverse interest rate environment.

110. *Id.*

111. Donahue, *Stable Value Wrap*, *supra* note 54, at 21-22.

112. See *supra* notes 79-84 and accompanying text. The amount by which the Stable Value return is lower, which we discussed above, see *supra* notes 98-100 and accompanying text, is the “premium” the plan is paying for the right of financially well-informed participants to be able to “put” their Stable Value investment to the fund in order to buy Money Market.

8. Disclosure Implications of AAG Inv-1.

The disclosures required by AAG Inv-1 will make selection against other participants easier.¹¹³ This raises the concern that Plan Sponsors will have to attempt to educate all participants about this possibility, potentially reducing the effectiveness of the option as a tool for long-term financial accumulation. However, the prudent response by a Plan Sponsor will be to take no action to make additional information available to participants where, in the exercise of prudence, it is not generally in the interests of participants to do so.

III. CONCLUSION

Plan Sponsor choice of Plan options in Section 404(c) participant-directed plans is a fiduciary responsibility of the Plan Sponsor. Section 404(c) does not relieve Plan Sponsors of liability for failing to uphold ERISA's "prudent expert" fiduciary duty standard in choosing plan options. Further, a Plan Sponsor must provide adequate disclosure of the risks and returns of each option offered, as well as having selected the option prudently, in order to shift the liability for their option selections to Plan Participants.

Stable Value Fund or Money Market Fund is a universal example of Plan Sponsor exercise of option selection, because of the requirement of a liquid, low volatility fund. In the context of a DC Plan, Stable Value has an absolute superiority to Money Market, as any reasonable due diligence investigation would make clear. The choice of a Money Market Fund instead of a Stable Value Fund meaningfully decreases Participant wealth and is a clear violation of a Plan Sponsor's duty to select options as a prudent expert. Participants who were offered only Money Market Funds have a right to recover the difference in lost income from Plan Sponsors as damages due to a breach of fiduciary duty.

Employer disclosure that does not identify the opportunity to profit from direct transfers between Stable Value and Money Market Funds is similarly inadequate. Participants who lost out because of the transfers of others are in the absence of adequate disclosure entitled to recover from the Plan Sponsor.

113. *See supra* note 61.